77-1686

In the Supreme Court of the United States

October Term, 1977

LEO SHEEP COMPANY
and PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, and
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in *Leo Sheep Company v. United States of America*, No. 76-1138.

OPINIONS BELOW

The opinion of the United States District Court for the District of Wyoming has not been officially reported and is appended hereto as Appendix A. The opinions of the United States Court of Appeals for the Tenth Circuit have been reported at 570 F.2d 881, 890, and are appended hereto as Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on May 17, 1977, and the order and supplemental opinion of that court denying rehearing were entered on February 28, 1978. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether lands granted by the United States in 1862 under the Union Pacific Railroad Act are subject to an implied reservation of easements that is inconsistent with express language of grant contained in the Act and in the patents issued pursuant thereto.

2. Whether the implication of reserved rights-of-way over lands granted by the United States in 1862 can be premised on the enactment in 1885 of the Unlawful Inclosures of Public Lands Act or the decision of this Court in *Camfield v. United States* construing the Act.

3. Whether an appellate court can as a matter of law infer Congressional intent contrary to express and unambiguous language of a Congressional act, with respect to an issue excluded from consideration by the trial court by stipulation of the parties, and in so doing preclude examination of legislative history and longstanding administrative interpretation of the act.

STATUTES INVOLVED

The statutes involved are the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended*, Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358, and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, which are reproduced in Appendix C.

STATEMENT OF THE CASE

Petitioners Leo Sheep Company and Palm Livestock Company conduct ranching operations on substantial acreages of fee and public lands in Carbon County, Wyoming, situated to the east and south of the Seminoe Reservoir. The fee lands of petitioners constitute for the most part odd-numbered sections patented to the Union Pacific Railroad Company or its assigns under authority of the Act of July 1, 1862, §§ 3, 4, ch. 120, 12 Stat. 489, 492, *as amended*, Act of July 2, 1864, § 4, ch. 216, 13 Stat. 356, 358 (hereinafter referred to as the "Union Pacific Act"). (Appendix C at xxviii-xxx.) The public lands consist of even-numbered sections, alternating between the patented lands of petitioners in a "checkerboard" fashion, utilized by petitioners under grazing licenses issued by the United States pursuant to Section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b.

On December 20, 1973, respondent United States commenced constructing a road across the fee lands of petitioner Leo Sheep Company from a county road on the east to the Seminoe Reservoir and its environs on the west and thereafter erected signs along this road inviting the public to use it for access to the Reservoir.

Petitioner Leo Sheep Company did not consent to the construction of this road, and respondent United States instituted no condemnation proceedings and offered no compensation to petitioner with respect thereto. Instead, respondent asserted the right to construct that road and other roads on the lands of petitioners without payment of compensation by reason of (i) common law easements of necessity said to burden petitioners' fee lands for benefit of the alternating lands of the United States and (ii) easements over petitioners' fee lands granted to the United States pursuant to the Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-66, which prohibits unlawful obstruction of the public domain. (See Appendix C at xxx-xxxii.)

Petitioners thereafter initiated this action to quiet their respective titles to the fee lands against the United States, pursuant to 28 U.S.C. § 2409a.[1] At a pretrial conference, the parties stipulated to the facts concerning petitioners' ownership of the fee lands, the construction of the road across the lands of petitioner Leo Sheep Company without permission or compensation, and the absence of any express reservation by the United States of a right-of-way in the patents to petitioners' lands. Both sides then moved for summary judgment, on the issues of the existence of common law ways of necessity and the effect of the Unlawful Inclosures of Public Lands Act.

[1]Petitioners' Complaint also sought to require the Secretary of the Interior and the Director of the Bureau of Land Management of the Department of the Interior to prepare and circulate an environmental impact statement prior to construction of roads across the railroad grant lands and prior to permitting substantial increase in public use of the Seminoe Reservoir, pursuant to Section 102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(c).

On November 13, 1975, the District Court granted petitioners' motion for summary judgment and quieted their respective titles to the fee lands against respondent United States. The court held that (i) no act or patent of the United States granted access easements across the fee lands of petitioners for the benefit of public domain lands and (ii) reservations of easements of necessity burdening the fee lands of petitioners could not be implied in the patents to petitioners' predecessors in title because the sovereign power of eminent domain permitted the United States to condemn such rights-of-way as it might require for access to public lands. (Conclusions of Law Nos. 3, 4, 6, Appendix A at iv, v.) The court noted that for 110 years after the grant of the fee lands to the Union Pacific Railroad Company in 1862, no officer or agent of the United States had construed the grant or the patents issued pursuant thereto as conferring any right in the United States, its agents or the public to traverse the lands granted to the railroad, and it held that condemnation was the only permissible means by which the United States could acquire an interest in petitioners' lands. (Conclusions of Law Nos. 5, 6, Appendix A at v.)[2]

On appeal of respondents, the Court of Appeals for the Tenth Circuit, in a 2-1 decision, reversed the judgment

[2]In light of its decision that the United States had no authority to construct the roads at issue, the District Court declined to determine whether respondents were required to prepare an environmental impact statement. (Conclusion of Law No. 7, Appendix A at v.)

of the District Court on an issue not presented to or decided by that court, *i.e.*, whether as a matter of law Congress had *intended* that the United States reserve an implied right-of-way over the lands granted pursuant to the Union Pacific Act. The Court of Appeals held that the trial court had erred in "holding" that there was no such implied reservation (although the trial court had not in fact addressed this issue), for the stated reason that "[t]o hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in [the court's] view would be unwarranted." (Appendix B at xi.)

The Court of Appeals did not conclude that the United States was entitled to a common law way of necessity across petitioners' fee lands; it did not challenge — or even mention — the conclusion of the District Court that the sovereign power of eminent domain possessed by the United States removed any necessity for the implication of ways across petitioners' lands. The court also did not base its determination on legislative history, administrative construction or other evidence of Congressional intention. Rather, the court found itself "unable to conclude" that Congress had intended to grant lands to the railroad without reserving a right of access to lands retained by the United States. (Appendix B at xi.) Thus the court added a reservation in the Union Pacific Act that the Congress had neglected to make, and created rights in the United States by judicial act that had not been claimed by the United States for 110 years and were not discoverable by grantees of the United States or their successors from the language of any statute or from any public land record.

Petitioners thereafter filed a petition for rehearing with a suggestion for *in banc* consideration. Nine months later, on February 28, 1978, the Tenth Circuit denied *in banc*

consideration by a 4-3 vote and issued a supplemental opinion denying rehearing. In response to petitioners' request for a remand to the District Court so that petitioners would have the opportunity to address the issue on which the case had been decided by the Court of Appeals and to present legislative history, expert testimony and other evidence bearing on the supposed Congressional intention identified by the court, the court held that the "issue of implied reservation posed an issue of law" and that petitioners were not entitled to make a showing on the matter. (Appendix B at xxvii .)

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit creates implied easements, not known at common law and never before recognized by any court, across a minimum of 150,000,000 acres of land throughout the United States. The decision raises important, unprecedented issues of federal law and contravenes consistent decisions of this Court concerning public grants and security of patent titles; it legislates reservations in a Congressional grant act, inconsistent with the express language of the act, for the express purpose of negating "carelessness" or "lack of foresight" on the part of Congress.

We respectfully submit that the case merits review by this Court for the following reasons:

A. *The case presents a federal question of far-reaching impact on land titles.*

The decision of the Tenth Circuit impresses rights-of-way of undefined scope (i) across all lands patented pursuant to the Union Pacific Act and other railroad grant

acts with aggregate acreage throughout the United States in excess of 131,000,000 and (ii) upon some 17,000,000 acres of checkerboard lands granted to the states for roads, canals and other improvements as early as 1827.[3] In each of these land grant acts, Congress purported to make an absolute grant, patents were issued without reserved easements, and no implied easement inconsistent with the grant has ever been asserted by the United States. The decision below, if allowed to stand, will provide a basis for inferring nineteenth century Congressional intention to reserve twentieth century ways for public crossings under all Congressional land grant legislation without use of condemnation procedures and payment of just compensation. The precedent of the decision, moreover, as a license for judicial legislation, extends beyond the railroad and public improvement grant legislation; it would cloud titles under any public land act or any public grant that is measured, by hindsight, as inopportune or lacking in foresight.

If the decision stands, persons in untold numbers who have conveyed public grant lands without actual or constructive notice of limitations on their titles will be potentially liable for breach of warranty. Persons who have acquired and improved lands on the basis of clear title opinions or title insurance policies are now exposed to noncompensable losses by the opening of public ways through their lands. Persons who issued such opinions or insurance policies are now potentially liable for the value of the property lost. The lands potentially affected may have been subdivided or otherwise intensively developed; the reserved rights burdening such lands may be claimed by the United States — or its successors — on behalf of

[3]See P. Gates, *History of Public Land Law Development* 345-46, 356-79, 384-85 (1968).

lands no longer in public ownership and for benefit of any conceivable activity no matter how remote from uses contemplated in the 1800's.

Although the foregoing description of the impact of the decision may, at first blush, be viewed as an argumentative parade of horrors, we respectfully submit that each of these consequences is reasonably foreseeable from the language and rationale of the Court of Appeals.

B. *The questions presented involve important matters of federal law not heretofore resolved by this or any court.*

The Court of Appeals held, as a matter of federal law, that reservations can be implied in public land grants incompatible with unqualified language of grant in the authorizing act and implementing patent. The propriety of such a holding is a matter of significant federal law, a matter of first impression, that has (i) not heretofore been resolved by this or any other court and (ii) digresses completely from positive pronouncements of this Court in related areas, in that:

1. No case was cited by the Court of Appeals or counsel for the Government that reached this result.

2. Decisions of this Court and other courts that have recognized rights in the United States by reservation have never imputed a right on behalf of the Government that is inconsistent with unequivocal language of Congressional grant or reservation. Congress has often expressly required reservations in grants of public lands (*e.g.*, 43 U.S.C. §§ 146, 299, 359, 375d, 542, 682b, 945, 965d, 1068, 1424), and in such cases it is settled that, as a matter of federal law, an

unrestricted patent of such lands will not convey what the law has reserved. *Swendig v. Washington Water Power Company*, 265 U.S. 322, 332 (1924); *United States v. State of Washington*, 233 F.2d 811, 817 (9th Cir. 1956). And where express reservations of federal lands are authorized and made, reservations ancillary thereto have been implied, again as a matter of federal law, where consistent with and necessarily incident to the enjoyment of the rights explicitly reserved. *Winters v. United States*, 207 U.S. 564 (1907); *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

However, where Congress has directed that lands be patented *without* restriction or limitation, patent reservations have been held inoperative as a matter of federal law. *Shaw v. Kellogg*, 170 U.S. 312, 337-38 (1898); *Deffeback v. Hawke*, 115 U.S. 392, 406 (1885).

If rights cannot be *expressly* reserved from a grant by the United States when such reservation is inconsistent with Congressional command, it would follow that such rights may not be *impliedly* reserved. No decision has been found that holds to the contrary.

3. The District Court held that the United States was not entitled to claim the benefit of an easement implied by necessity because the sovereign power of eminent domain permitted it to take what ways it needed. (Appendix A at v.) In so holding, the District Court applied a settled common law conveyancing rule to the United States.[4]

[4]See *State v. Black Brothers*, 116 Tex. 615, 297 S.W. 213, 218-19 (1927); *Pearne v. Coal Creek Mining and Manufacturing Company*, 90 Tenn. 669, 18 S.W. 402, 404 (1891); see also *United States v. Rindge*, 208 F. 611, 619 (S.D. Calif. 1913); *Bully Hill Copper Mining and Smelting Company v. Bruson*, 4 Cal. App. 180, 87 P. 237, 238 (1906); *Simonson v. McDonald*, 131 Mont. 494, 311 P.2d 982 (1957); *Guess v. Azar*, 57 So. 2d 443, 444-45 (Fla. 1952).

The Court of Appeals did not discuss this conclusion of the District Court or the authorities supporting the common law rule, yet it created as a matter of federal law an interest in the United States that is in all material respects identical to an easement by necessity, without the requirement of necessity. No authority supports the implication of such an interest, either at common law or under any federal legislation, either on behalf of a sovereign or an individual grantor.

C. *The decision below contravenes and fundamentally misconstrues decisions of this Court.*

1. *The Unlawful Inclosures Act and other "fence" cases.* The Court of Appeals relied on *Camfield v. United States*, 167 U.S. 518 (1897), and *Buford v. Houtz*, 133 U.S. 320 (1890), as "judicial recognition that Congress, by its 1862 grant to the railroad of the odd-numbered sections, did by implication intend to reserve a right of access to the interlocking even-numbered sections *not* conveyed to the railroad." (Appendix B at xvi.)

In *Camfield*, the Court construed the Unlawful Inclosures Act to authorize Government attorneys to abate as nuisances fences on private checkerboard lands surrounding and thereby appropriating vast areas of public land; it holds only that the "Property Clause [U.S. Const., Art. IV, § 3, cl. 2] is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

Similarly, in *Buford* the Court affirmed the denial of injunctive relief sought by owners of checkerboard land against sheepherders who made no effort to keep their

flocks from grazing on plaintiffs' lands in conjunction with the interspersed public lands. The decision, as in *Camfield*, was explicitly premised upon a reluctance to lend judicial authority to the attempted monopolization of public lands.

Neither of these decisions was premised upon the existence of an easement in the United States across private lands for the benefit of public lands; neither authorized construction of roads across private land for public purposes; neither construed the Union Pacific Act or any other Congressional land grant. Both were confined to the interpretation of rights in *public* lands of persons attempting to monopolize such lands by fencing or other means. If the construction of the Unlawful Inclosures Act adopted by the Court of Appeals ostensibly on the basis of *Camfield* is allowed to stand, it will amount to judicial sanction of the later imposition of servitudes by Congress on lands previously granted by it, in violation of principles long since settled by this Court. See *Union Pacific Railroad Company v. United States*, 99 U.S. 700, 718-19; (1879); *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. Causby*, 328 U.S. 256, 261-62 (1946).

2. *The "act and conveyance" cases.* The Court of Appeals cited *Missouri, Kansas and Texas Railway Company v. Kansas Pacific Railway Company*, 97 U.S. 491 (1878), and *Schulenberg v. Harriman*, 88 U.S. 44 (1875), for the proposition that a legislative land grant, being both a conveyance and an act, may be interpreted retrospectively on the basis of assumed congressional intent without regard for principles of conveyancing and title security recognized by this Court. (Appendix B at x.) Both decisions, however, merely stated hornbook principles that a

Congressional land grant is both a conveyance and an act and that, therefore, the grant when finally located can be effective from the date of the act rather than the date of the location or patent; neither purported in any way to authorize an inference of Congressional intent that is *inconsistent* with the express and unqualified language of grant in the same Congressional act. In its misplaced reliance on these decisions, the Court of Appeals contravened the fundamental rule that public grants "are not to be so construed as to . . . withhold what is given either expressly or by necessary or fair implication." *United States v. Denver and Rio Grande Railway Company*, 150 U.S. 1, 14 (1893); see *Russell v. Sebastian*, 233 U.S. 195, 205 (1914).

3. *The "title security" cases.* The decision of the Court of Appeals is incompatible with decisions of this Court protecting title security and patent defensibility. This Court has held that it is through the recognition of a patent "as a record of the government that its security and protection chiefly lie." *Beard v. Federy*, 70 U.S. 478, 492 (1866). It is the "unassailable character" of a patent which "gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces." *St. Louis Smelting and Refining Company v. Kemp*, 104 U.S. 636, 641 (1882). The conclusiveness of patents and the right of a patentee and his successors to rely upon the title record has been affirmed by this Court in refusing to permit collateral challenge to determinations of fact supporting patent issuance, *St. Louis Smelting and Refining Company v. Kemp, supra*, and in refusing to countenance the uncertainty that would be created by purporting to reserve from a patent "mineral lands" identified as such after patent. *Burke v. Southern Pacific Railroad Company*, 234 U.S. 669 (1914). The decision below cannot stand without severely undermining the title security recognized by these decisions.

4. *The "judicial legislation" cases.* The Court of Appeals held that the question of Congressional intent in enacting the Union Pacific Act "posed an issue of law" and refused petitioners' request for a remand for the taking of evidence in the trial court on the question. (Appendix B at xxvii.) The court did not have before it evidentiary matter pertaining to Congressional intent in connection with enactment of the Act; it held that Congress *must* have intended to reserve an easement simply because as a matter of law the Court was "unable to conclude" that Congress could have meant otherwise. (Appendix B at xi.)

The authority of a court to infer Congressional purpose is limited to situations where it first finds an ambiguity in the legislative pronouncement; where, as here, the language of a statute is not found to be ambiguous or in any way unclear, a court cannot divine some unexpressed Congressional purpose contrary to the language employed. *Bate Refrigerating Company v. Sulzberger,* 157 U.S. 1, 36-37 (1895); *United States v. Missouri Pacific Railroad Company,* 278 U.S. 269, 277-78 (1929). If the decision below were justified as judicial construction of an ambiguous act (a justification not even claimed by the Court of Appeals), it would have been incumbent upon the court under decisions of this Court to have identified the ambiguity in the language employed and thereupon to have engaged in a "considered weighing of every relevant aid to construction." *United States v. Dickerson,* 310 U.S. 554, 562 (1940). Such consideration requires examination of a statute's "administrative and legislative history." *McCaughn v. Hershey Chocolate Co.,* 283 U.S. 488, 492 (1931); see, *e.g., Great Northern Railway Company v. United States,* 315 U.S. 262 (1942).

The Court of Appeals did not identify any statutory ambiguity in the Union Pacific Act; it did not purport to weigh "every relevant aid to construction"; it disallowed consideration of legislative and administrative history. It did not engage in permissible statutory construction; it engaged in impermissible judicial legislation.

D. *The Court of Appeals evidenced uncertainty in its decision and recognized the significance of the issues raised.*

An initial 2-1 decision of the Court of Appeals in this case was rendered on May 17, 1977. Petitioners thereafter filed a petition for rehearing with a suggestion of *in banc* consideration. The Court of Appeals then requested the United States to file a response to the rehearing request, which the Government did on June 16, 1977.

Nearly nine months later, the Court of Appeals issued its opinion denying rehearing, by another 2-1 decision, along with an order noting that the court had voted 4 to 3 to deny *in banc* consideration. (Appendix B at xxi-xxii.) In its supplementary opinion, the court agreed that the issue of Congressional intent in the Union Pacific Act "is a difficult problem and not one which is free from all doubt." (Appendix B at xxvii.)

The Tenth Circuit was clearly troubled by the question it had determined and was split on its proper resolution. In view of its far-reaching impact, the question should be reviewed by this Court.

CONCLUSION

For the reasons stated herein, petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

LEO SHEEP COMPANY and PALM LIVESTOCK COMPANY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR and CURT BERKLUND, Director, Bureau of Land Management,

Defendants.

No. C74-127

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The above-entitled matter coming on regularly for hearing before the Court, plaintiffs appearing by and through their attorneys, John A. MacPherson of MacPherson & Golden, Rawlins, Wyoming, and Clyde O. Martz and Howard L. Boigon of Davis, Graham & Stubbs, Denver, Colorado, and the defendants appearing by and through their attorney, Tosh Suyematsu, Assistant United States Attorney, and it having been stipulated and agreed that the matter would be submitted to the Court for decision upon a stipulation of facts, motion for summary judgment and cross-motion for summary judgment, and the parties having further agreed that there are no genuine issues of material fact with respect to the subject matter and that the matter can be decided upon the motions for summary judgment filed herein, and the Court having reviewed the pleadings, interrogatories, answers thereto, and memorandum briefs, together with all other materials on file herein, and being fully advised in the premises, DOTH FIND:

FINDINGS OF FACT

1. That this is an action to quiet title against the United States pursuant to 28 U.S.C. § 2409a and to require the Secretary of the Interior and the Director of the Bureau of Land Management to file an environmental impact statement pursuant to § 102(c) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(c).

2. That plaintiffs Leo Sheep Company and Palm Livestock Company are the owners in fee simple, subject to mineral reservations, easements and encumbrances of record, of certain patented lands in Townships 22-25 North, Ranges 82-84 West, 6th P.M., in Carbon County, Wyoming, consisting, with a few exceptions not herein relevant, of the odd-numbered sections in said townships and ranges (fee lands). Said fee lands alternate in a "checkerboard" fashion with public domain lands on which plaintiffs conduct livestock operations conjunctively with the fee lands, under licenses issued by the defendant United States of America pursuant to Section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b, and the regulations promulgated thereunder, 43 C.F.R. § 4115.2-1 (1974). No fences separate the fee lands from the public domain lands.

3. That said fee lands were granted to the Union Pacific Railroad Company by the Act of July 1, 1862, ch. 120, 12 Stats. 489, as amended, Act of July 2, 1864, ch. 216, 13 Stats. 356, and were patented to successors of said railroad company in the years 1900-03. None of the patents contains an express reservation of a right of way on behalf of the United States over the lands granted for access to the lands retained by the United States. No language in the railroad land grants acts reserves or in any way refers to any such right of way on behalf of the United States.

4. That the fee lands are situated to the east and south of the Seminoe Reservoir. During the year 1973, defendant United States of America, through its officers and agents, asserted that it had the right to construct, without compensation to plaintiffs, a road across the fee lands for use by members of the public in obtaining access

to the east side of the Seminoe Reservoir. The basis of the assertion was stated to be either an easement for access impliedly reserved on behalf of the United States in the patents to the fee lands or an easement of necessity granted to the United States pursuant to common law. Defendant asserted an easement in plaintiffs' lands on no other basis.

Following the refusal of plaintiffs to acknowledge the existence of such right, the United States of America, acting by and through officers and employees of the Bureau of Land Management of the Department of the Interior, on December 20, 1973, commenced constructing a road extending from an existing road in Section 14, Township 24 North, Range 83 West, 6th P.M., westerly across both public domain lands (Sections 14, 16 and 22 of said Township and Range) and fee lands of plaintiff Leo Sheep Company (Section 15 of said Township and Range). Subsequently, defendants erected signs along said road inviting the public to enter thereon for access to the Seminoe Reservoir. Plaintiff Leo Sheep Company did not consent to the construction and defendant United States has neither offered nor paid any compensation to plaintiff for those portions of the fee lands traversed by the road.

5. That prior to construction of the above road, agents of the Bureau of Land Management of the Department of Interior prepared an "Environmental Analysis Record" to determine whether the proposed action by the United States should be preceded by the filing of an environmental impact statement pursuant to Section 102(c) of NEPA. The environmental analysis report considered only the question whether construction of the road constituted a major federal action significantly affecting the quality of the human environment within the meaning of NEPA and concluded that it did not.

6. That no environmental impact statement was prepared by agents of the United States prior or subsequent to construction of the road across the fee lands of plaintiff Leo Sheep Company. The United States has acknowledged that the road will presumably cause an increase in the number of users of the Seminoe Reservoir; it does not

intend to erect fences along the road to keep the public from trespassing on the fee lands and has limited its efforts to prevent such trespassing to the erection of signs along the road advising the public to remain thereon.

7. That Rule 71A, Federal Rules of Civil Procedure, provides a plain, adequate and speedy remedy whereby defendants may acquire right of way for road purposes leading to the east side of Seminoe Reservoir.

8. That following construction of the road and erection of the signs, plaintiffs initiated this action to quiet their title against the United States, pursuant to 28 U.S.C. § 2409a, and to require the Secretary of the Interior and the Director of the Bureau of Land Management of the Department of the Interior to prepare and circulate an environmental impact statement pursuant to § 102(c) of NEPA.

CONCLUSIONS OF LAW

1. The property of the United States can be conveyed, and interests therein reserved, only if Congress makes provision therefor; and only Congress may prescribe conditions and limitations upon the title conveyed by patent. In supervising the issuance of patents by which the Government passes title to portions of the public domain, the Secretary of the Interior has only such authority as Congress has granted him.

2. To the extent that the Secretary of the Interior has authority to determine the scope of the grant effected by a patent, the failure of the Secretary to include an express reservation in the patent precludes the Government from subsequently asserting the existence of such limitation. The issuance of the patents to the fee lands without express reservation of access easements on behalf of the public bars the Government from asserting the existence of such easements subsequent thereto.

3. Implied reservations as against express covenants are not favored and are limited to ways of strict necessity, requiring clear and convincing evidence of need and resolving all doubts against the grantor.

4. Easements may not be implied in patents in favor of the United States because the sovereign power of eminent domain permits the United States to condemn such rights of way as may be reasonably required for access to any public lands under Rule 71A, Federal Rules of Civil Procedure.

5. For 110 years after the grant of the fee lands to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency or agent of the United States construed the grant or the patents issued pursuant thereto as conferring any right upon the United States, its agents or the public to traverse the lands granted to the railroad, and such administrative construction should be given great weight in the event of doubt concerning the scope of the grant.

6. Accordingly, this Court concludes that the United States has not reserved or received by grant, expressly or by implication, and does not now have, any right, by easement or otherwise, in the lands of plaintiffs for access to the east bank of Seminoe Reservoir, or for construction of public roads across the lands of plaintiffs for access to said reservoir and lands, and absent condemnation proceedings and payment of just compensation is without authority to construct such road.

7. In light of the foregoing, it is unnecessary for the Court to rule at this time upon the necessity of preparation of an Environmental Impact Statement as required by § 102(c) of NEPA.

8. An order will be entered sustaining plaintiffs' motion for summary judgment and quieting title to plaintiffs' fee lands against the defendants.

Dated this 13th day of November, 1975.

s/EWING T. KERR

Judge

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1138

LEO SHEEP COMPANY, et al., Plaintiffs-Appellees, v. UNITED STATES OF AMERICA, et al., Defendants-Appellants.	Appeal from the United States District Court for the District of Wyoming. (D. C. No. C 74-127)

Filed May 17, 1977

Before McWILLIAMS, BARRETT, and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

Leo Sheep Company and Palm Livestock Company, both Wyoming corporations, brought suit against the United States of America, the Secretary of the Interior, and the Director of the Bureau of Land Management for declaratory and injunctive relief under the Quiet Title Act, 28 U.S.C. § 2409a. The plaintiffs, as owners of certain odd-numbered sections of land in Carbon County, Wyoming, claimed that the United States had unlawfully entered their property by *clearing a pathway* across certain of their section corners, which interlocked with the even-numbered sections of the public domain. By answer the United States acknowledged clearing this path, and claimed it had the legal right to do so. After stipulating to

the facts, both sides moved for summary judgment. The district court ruled in favor of the plaintiffs, and the United States now appeals.

The odd-numbered sections of land here involved were granted by Congress in 1862 to the Union Pacific Railroad. Act of July 1, 1862, ch. 120, 12 Stat. 489, 492(3) and (4), *as amended,* Act of July 2, 1864, ch. 216, 13 Stat. 356, 358(4). Leo Sheep, hereinafter referred to as the plaintiff, now owns the odd-numbered sections as successor-in-title to the railroad. By virtue of leases issued under section 3 of the Taylor Grazing Act, 43 U.S.C. § 315(b), plaintiff also uses the interlocking even-numbered sections of the public domain for general grazing and pasturage, and thereby has integrated its operations into an undivided unit. However, the fact that plaintiff has grazing rights in the even-numbered sections is not urged by either party as being of any particular significance, and hence for the purposes of this case, at least, the even-numbered sections may be treated as simply being part of the public domain, which indeed they are.

Under the stipulation, we are here concerned with Section 15, Township 24 North, Range 83 West, 6th P.M., which is owned by the plaintiff as successor-in-interest to the railroad. The grant by Congress to the railroad in 1862 was of the odd-numbered sections, which made for a checkerboard effect. The aforesaid Section 15 is hence surrounded on all four sides by sections of the public domain. In 1938 the Bureau of Reclamation built the Seminoe Reservoir to the west and south of Section 15. Down through the years the reservoir and adjacent area have been used for fishing and hunting. Problems have arisen concerning the ability of the public to gain access to the area. In 1965 several livestock operators established Elk Mountain Safari, Inc.,[1] which proceeded to institute a system of "access fees" which the public had to pay before they could get into the area. The Government received complaints about this practice, and attempted to

[1]Elk Mountain Safari, Inc. was a plaintiff in the present proceeding, but was later withdrawn from the case.

negotiate with the livestock owners to secure public access to the Seminoe Reservoir area. When these negotiations failed, the Government decided to relocate and improve an existing dirt road in that area in order to provide the public access to the reservoir area from a nearby public highway. The Government's effort to establish such a road is what generated the present dispute.

Reference is now made to the appendix which is a sketch of the area in question. Section 15, as well as other odd-numbered sections, which on the sketch are shaded, are owned by the plaintiff as the successor-in-title to the railroad. As indicated, the Seminoe Reservoir lies to the west and south of Section 15. Sections 14, 22, and 16 are public domain belonging to the United States. The Hanna-Leo Road, a county road, runs more or less north and south at the eastern edge of Section 14.

In an effort to give the public access to the reservoir area, and at the same time minimize any possible trespass to plaintiff's lands, the Bureau of Land Management proposed to use a pre-existing road that ran westerly from the Hanna-Leo county road in Section 14, crossing the corner of Section 15 into Section 22, and to then relocate the road so as to run westerly across the top of Section 22, which was public domain, and then across the southwest corner of Section 15 into Section 16, again part of the public domain, and thereby gain access to the reservoir.[2]

On or about December 20, 1973, the Bureau began to blade this pre-existing road which ran from the Hanna-Leo Road, a public highway, into Section 14. In this regard, the parties stipulated as follows:

[2]We note, still referring to the appendix, that there apparently is another pre-existing dirt road that cuts off from the Hanna-Leo county road and runs westerly directly through Sections 14, 15, and 16 to the reservoir area. Additionally, the pre-existing dirt road, a portion of which was used by the Bureau of Land Management in the instant case, originally ran westerly through Sections 22 and 21, the latter section also being owned by the plaintiff.

> [BLM] began blading a pre-existing road starting at a county road in the south half of Section 14, Township North, Range 83 West, 6th P.M., on Bureau of Land Management lands, continuing westerly across said Section 14 and crossing the SE corner of Section 15 (fee section of Plaintiff Leo Sheep Company) approximately 30 feet from the Section corner through a pre-existing cattle-guard into Bureau of Land Management Section 22, thence continuing southwesterly approximately 1,000 feet where the blading operation departed the pre-existing road and resumed a westerly course marking a new route to the NW corner of Bureau of Land Management Section 22 co-terminal with the SW corner of Plaintiff Leo Sheep Company Section 15, crossing said SW corner of Section 15 approximately four feet from said section corner, into Bureau of Land Management Section 16 and thence bladed westward to the Shore of Seminoe Reservoir.

As indicated above, both the plaintiff and the Government moved for summary judgment based on a stipulation as to the pertinent facts. To resolve fully what is to us a rather complex problem by summary judgment is perhaps overly ambitious. Be that as it may, the Government's primary position in the trial court, as well as in this court, has been that in the 1862 congressional grant to the Union Pacific Railroad, the plaintiff's predecessor in title, there was an implied reservation of an easement. The trial court concluded as a matter of law that there was no such implied reservation of an easement, nor was there any common law easement by way of necessity, and on this basis entered summary judgment in favor of the plaintiff. Our study of the matter convinces us that the trial court erred in concluding that there was no implied reservation in the congressional grant of 1862.

In its grant to the railroad in 1862, Congress granted the railroad the odd-numbered sections on both sides of the proposed railroad right-of-way extending back from the

right-of-way some 10 miles. In 1864 the legislative grant was doubled to encompass lands lying within 20 miles on each side of the railroad. The even-numbered sections, which were not conveyed to the railroad, continued to be in the public domain. By granting to the railroad the odd-numbered sections, and retaining the even-numbered sections, a checkerboard effect resulted. With some exceptions, odd-numbered sections were surrounded on all four sides by even-numbered sections which were part of the public domain. Similarly, even-numbered sections owned by the Government as public land were also generally surrounded on all four sides by odd-numbered sections granted to the railroad. As a consequence, after the grant in 1862, either the Government had an implied easement to cross land granted the railroad to gain entry into an even-numbered section, or it had to get permission from the railroad to do so on the latter's terms. It is in this context that we must study the congressional grant in 1862 to the railroad of the odd-numbered sections in Carbon County, Wyoming.

A legislative grant of public land is a law as well as a conveyance, and such effect must be given to it as will carry out the intent of Congress. Missouri, Kan. and Tex. Ry. v. Kansas Pac. Ry., 97 U.S. 491 (1878) and Schulenberg v. Harriman, 88 U.S. 44, 62 (1875). Admittedly, there was no express reservation of an easement in the congressional grant of 1862 with which we are here concerned, but appellants contend that the intent of Congress was such that there was an *implied* reservation of an easement of access to the retained sections. In order to determine whether there was an implied reservation of an easement of access, we look solely to the intent of Congress, as such will not be defeated by application of the rules of common law. Missouri, Kan. and Tex. Ry. v. Kansas Pac. Ry., 97 U.S. 491 (1878).

Accordingly, our problem is to ascertain the intent of Congress when in 1862 it granted land in Carbon County to the railroad. The dominant intent behind the grant was not to help, as such, the railroads. The dominant intent, though

not without military overtones, the Civil War being then in progress, was to "open up" the West and develop it. To settle the West, the building of railroads was essential. But to build a railroad was a costly venture, and railroad companies would not build a railroad in what was then a virtual wilderness without financial inducement. And the grant of land by the Government to the railroad was that inducement. United States v. Union Pac. R.R., 91 U.S. 72 (1875).

This and other similar grants were made to give access to the unsettled territories and to encourage settlement and development of those lands. Winona & St. P.R.R. v. Barney, 113 U.S. 618 (1885); Platt v. Union Pac. R.R., 99 U.S. 48 (1878). It was Congress' intent that lands granted, and most certainly lands retained, would eventually be conveyed to private persons who would develop the land and, incidentally, patronize the railroad.

Based on the foregoing analysis, we conclude that in granting land to the Union Pacific Railroad in 1862, Congress by implication intended to reserve an easement to permit access to the even-numbered sections which were surrounded by lands granted the railroad. To hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in our view would be unwarranted. If there be no implied reservation, then the grant of the odd-numbered sections rendered inaccessible the interlocking even-numbered sections and such would have thwarted, rather than encouraged, settlement near the railroad. And if it reserved no right of access to the retained even-numbered sections, Congress not only granted the railroad the odd-numbered sections, but also granted the railroad the exclusive use of the even-numbered sections. We find ourselves unable to conclude that such was the intent of Congress.

We believe our conclusion that there was such a congressional intent in 1862 finds support in several decisions of the Supreme Court and also by the enactment by Congress in 1885 of the so-called Unlawful Inclosures Act. 43 U.S.C. § 1061, *et seq*. That act provides, in essence, that "[N]o person, by force, threats, intimidation . . . or any

other unlawful means, shall prevent or obstruct . . . free passage over or through the public lands. . . ."

In Camfield v. United States, 167 U.S. 518 (1897), the Supreme Court upheld the constitutionality of the Unlawful Inclosures Act. The defendants in *Camfield* were all successors-in-interest to land granted the Union Pacific Railroad, and thus in a comparatively large area, including many townships, the defendants owned the odd-numbered sections, with the Government retaining the even-numbered sections as part of the public domain. The defendants had constructed fences a few feet back from the township line in all odd-numbered sections. And in the four surrounding townships, again in the odd-numbered sections, constructed fences a few feet back from the township line. The net effect was that a given township could be completely fenced in.

It was in this setting that the United States brought a suit in equity under the Unlawful Inclosures Act to compel the removal and abatement of fences maintained by the several defendants which had in this manner enclosed some 20,000 acres of public lands. The defense raised was that in each instance the fences had been built on land owned by the defendants and acquired from the railroad and its successors-in-interest. The Supreme Court rejected this defense and upheld the statute under the police power of the state. In thus holding, the Supreme Court commented upon the nature of the grant to the railroad as follows:

> We are not convinced by the argument of counsel for the railway company, who was permitted to file a brief in this case, that the fact that a fence built in the manner indicated will operate incidentally or indirectly to enclose public lands, is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining the even ones as public lands; and that if such a result inures to the damage of the United States it must be ascribed to their improvidence and carelessness in

> so surveying and laying off the public lands, that the portion sold and granted by the Government cannot be enclosed by the purchasers without embracing also in such enclosure the alternate sections reserved by the United States. Carried to its logical conclusion, the inference is that, because Congress chose to aid in the construction of these railroads by donating to them all the odd-numbered sections within certain limits, it thereby intended incidentally to grant them the use for an indefinite time of all the even-numbered sections. It seems but an ill return for the generosity of the Government in granting these roads half its lands to claim that it thereby incidentally granted them the benefit of the whole.

Another Supreme Court decision which sheds light on our present problem is Buford v. Houtz, 133 U.S. 320 (1890). The plaintiffs in *Buford* were cattlemen who owned the odd-numbered sections in a vast tract of land in Utah as successors in interest to the Central Pacific Railroad Company, the latter having itself acquired the land by grant of Congress. The even-numbered sections in the tract were owned by the United States, and the defendant sheepmen had been accustomed to grazing their sheep on these public lands. In so doing, however, the sheep trespassed upon the plaintiffs' lands.

In this setting the plaintiffs in *Buford* brought a bill in equity against the sheepmen, asserting, among other things, that the sheepmen had no "right of way for any of his or their sheep over said lands of plaintiffs, or any part thereof, except over and along the highways aforesaid . . . ." and seeking an injunction. The district court for the then Territory of Utah dismissed the bill for lack of equity. On appeal the Supreme Court for the Territory of Utah affirmed, and the United States Supreme Court in turn affirmed the territorial Supreme Court. In so doing the United States Supreme Court stated that growing out of the custom of nearly a hundred years the defendant sheepmen had an "implied license" to graze their sheep on

the public domain. The Court rejected the contention of the plaintiff cattlemen that the sheepmen should not be permitted to use the public land because in so doing, "their cattle trespass upon the unenclosed lands of plaintiffs." So in *Buford* the Supreme Court held that sheepmen who trailed their sheep across plaintiffs' land in order to get to the public domain were not subject to an injunction. The Court, in balancing the equities, noted that to hold to the contrary would mean that the plaintiff cattlemen, owning approximately 350,000 acres scattered in checkerboard fashion through a large tract consisting of some 921,000 acres, could "exclude" the defendant sheepmen from the whole tract and in effect obtain for themselves a "monopoly" of the entire tract. The Court observed that it was not able to observe any equity in such a result.

A case arising out of Utah, when that state was a part of the Eighth Circuit, has bearing on the present dispute. Mackay v. Uinta Development Co., 219 F. 116 (8th Cir. 1914), involved a dispute between rival groups of sheepmen. Uinta Development Company owned the odd-numbered sections in a large tract of land, having acquired these odd-numbered sections from successors in interest to the Union Pacific Railroad, who in turn had acquired the land by act of Congress. The even-numbered sections remained unoccupied public domain. Mackay on occasion drove his sheep across portions of the land owned by the Uinta Development Company, in getting between his summer and winter ranges. Uinta served notice on Mackay to stay off the odd-numbered sections owned by Uinta. Mackay refused and at the company's instance was arrested for trespass.

Uinta then brought suit against Mackay for damages resulting from Mackay's trailing his sheep across Uinta's land. Mackay counterclaimed for damages resulting from Uinta's wrongful obstruction of his passage and from his arrest and criminal prosecution for trespassing. Upon trial, judgment entered for Uinta and Mackay appealed.

At trial Mackay asked the Court for the following declaration of law:

> [T]hat, if it found from the evidence that the company was in the rightful possession of the odd-numbered sections and did not designate a course for him to follow, then as a licensee of the government he was entitled to select a reasonable way over which to trail his sheep, and if it further found that the way he selected was a reasonable one, and was used for the purpose of driving his sheep to and upon the public domain, then as a matter of law, he would not be liable in damages for crossing the company's sections.

The trial court refused the request for such a declaration. However, on appeal, the Eighth Circuit Court held that the requested declaration was a correct statement of the law. In reversing the trial court the Eighth Circuit, applying a balancing test of its own, stated the problem as follows:

> Mackay claimed the right to trail his sheep over the even-numbered sections of the public domain and to do what else was necessary to secure it without subjecting himself to a charge of trespass. The company admitted his right as to the public domain, but warned him not to go over any of its lands on penalty of prosecution for trespass. The odd-numbered sections touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. . . . As long as the present policy of the government continues, *all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.* (Emphasis added.)

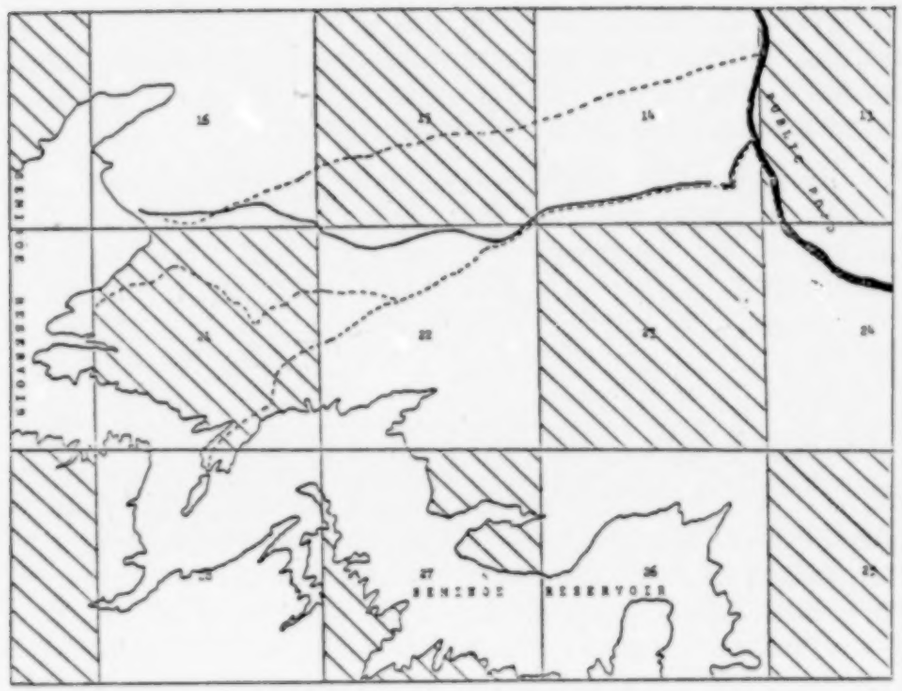
The cases above referred to indicate to us a judicial recognition that Congress, by its 1862 grant to the railroad of the odd-numbered sections, did by implication intend to reserve a right of access to the interlocking even-numbered sections *not* conveyed to the railroad. While none of the above cases uses the term "implied reservation," all recognize the right of the Government and the public to have access to the public domain, and each holds that this right cannot be denied by the fact that the interlocking odd-numbered sections are privately owned. Also, as earlier mentioned, we believe that the Unlawful Inclosures Act, when applied to a checkerboard railroad grant, is itself evidence of congressional recognition in 1885 that there was such an implied reservation in the 1862 railroad grant.

The patent on Section 15, which section is apparently by stipulation serving as an exemplar, did not issue until around 1900, and the patent as issued by the Secretary contained no express reservation of any right of entry. In this regard, the trial court concluded that "the failure of the Secretary to include an express reservation in the patent precludes the Government from subsequently asserting the existence of such limitation [presumably by implication] . . . ." With this we do not agree.

The district court correctly noted that only Congress can condition or limit a title conveyed by patent, and the Secretary of the Interior, as an agent of the Congress, can reserve only what Congress authorizes him to reserve. Shaw v. Kellogg, 170 U.S. 312, 337-38 (1898); Deffeback v. Hawke, 115 U.S. 392, 406 (1885). The inverse of this, however, is also true: A patent cannot convey what has been reserved by law. Swendig v. Washington Water Power Co., 265 U.S. 322 (1924); United States v. Washington, 233 F.2d 811 (9th Cir. 1956). The congressional grant in 1862 itself acted as a transfer, and operates *in praesenti*. Schulenberg v. Harriman, 88 U.S. 44 (1874). The real issue is whether there was an implied reservation in the congressional grant of 1862. We have now held that there was. The absence of an express reservation in the patent did not negative the implied reservation in the earlier grant. A patent is merely evidence of a grant, and the issuing officer acts ministerially, not judicially. United States v. Stone, 69 U.S. 525, 535 (1864); United States v. Washington, 233 F.2d 811 (9th Cir. 1956).

Whether this entire controversy can ultimately be resolved on a summary judgment basis, we do not know. We do know, for example, that the trial court, having concluded that there was no implied reservation, found it unnecessary to consider whether there was any necessity for the preparation and filing of an Environmental Impact Statement. Other issues may also remain. Be that as it may, at the heart of the trial court's ruling was its conclusion that in the congressional grant of 1862 there was no implied reservation. Having satisfied ourselves that in thus holding the trial court misjudged the intent of Congress, the judgment must be reversed and the cause remanded with directions that the trial court take up at that point. The trial court should proceed on the premise that there was an implied reservation of an easement in the congressional grant in 1862 of the odd-numbered sections in Carbon County, Wyoming to the Union Pacific Railroad.

Judgment reversed.



Area Near Seminoe Dam, Carbon County, Wyoming

Odd-numbered sections granted to railroad in 1862 and now owned by plaintiff

Even-numbered sections of public domain

Pre-existing dirt road

Pre-existing dirt road improved by B.L.M. December 1973

Dirt road relocated by B.L.M. December 1973

BARRETT, Circuit Judge, dissenting:

I respectfully dissent. Significantly, the United States did not believe for the past 110 years that it was endowed with the gratuities found in the majority opinion. This is evidenced in the uncontroverted finding of the District Court which goes far to prove the correctness of the decision we reverse: "For 110 years after the grant of the fee lands to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency or agent of the United States construed the grant or the patents issued pursuant thereto as conferring any right upon the United States, its agents or the public to traverse the lands granted to the railroad, and such administrative construction should be given great weight in the event of doubt concerning the scope of the grant."

It is fundamental that a grant is to be construed strictly against the grantor. Congress did not expressly reserve easements in the grants or patents issued pursuant thereto to reach the even-numbered sections. Such failure precludes judicial legislation. No statutory authorities or common law principles are cited which confer upon the United States the special privilege granted here.

The discussion relative to the Unlawful Inclosures Act, combined with the *Camfield* and *Buford* decisions, lends no credence to the majority's holding that ". . . when applied to a checkerboard railroad grant, is . . . evidence of congressional recognition in 1885 that there was such an implied reservation in the 1862 railroad grant."

The majority opinion does not, in my view, stress the fact that Leo Sheep Company *is not* challenging the right of the United States to obtain the right-of-way across its private land. What the case is all about is whether the United States may *take the private land for access purposes without compensation.* This point is not recognized in the majority opinion. In fact, the observation is made that without the aid of the implied reservation, the grant of

the odd-numbered sections defeated access to the interlocking even-numbered sections.

It is uncontroverted that Leo Sheep Company must employ the condemnation statutes in order to obtain a right-of-way easement over and across the lands of another. Our holding here is that the United States — on the basis of an implied reservation — is a "favored person." In my view the United States is in no better position than Leo Sheep Company. By imposing the public servitude, i.e., the "implied reservation" to use the privately owned lands acquired via the railroad grants for right-of-way easement purposes without the payment of any compensation, we have, I believe, permitted the United States to take private property without compensation in violation of rights guaranteed Leo Sheep Company by the Fifth Amendment to the Constitution.

I would affirm the District Court's judgment, findings and conclusions.

JANUARY TERM — FEBRUARY 28, 1978

Before Honorable Oliver Seth, Circuit Judge,
Honorable William J. Holloway, Jr., Circuit Judge,
Honorable Robert H. McWilliams, Circuit Judge,
Honorable James E. Barrett, Circuit Judge,
Honorable William E. Doyle, Circuit Judge,
Honorable Monroe G. McKay, Circuit Judge,
Honorable James K. Logan, Circuit Judge

LEO SHEEP COMPANY and
PALM LIVESTOCK COMPANY,

Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR,
and CURT BERKLUND, Director,
Bureau of Land Management,

Defendants-Appellants.

No. 76-1138

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc, together with appellants' response to the petition.

Upon consideration whereof, the petition for rehearing is denied, with Judges McWilliams and Doyle, to whom the case was argued and submitted, voting to deny rehearing, and Judge Barrett, also on the hearing panel and who dissented in the opinion filed May 17, 1977, voting to grant rehearing.

Judge Barrett having requested a vote of the active court on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied, with Judges Holloway, McWilliams, Doyle and Logan voting to deny rehearing en banc, and Judges Seth, Barrett and McKay voting to grant rehearing en banc.

An opinion on petition for rehearing is being filed contemporaneously with the entry of this order.

HOWARD K. PHILLIPS
Clerk

By s/Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1138

LEO SHEEP COMPANY, et al., Plaintiffs-Appellees, v. UNITED STATES OF AMERICA, et al., Defendants-Appellants.	Appeal from the United States District Court for the District of Wyoming. (D. C. No. C 74-127)

OPINION ON PETITION FOR REHEARING

Before McWILLIAMS, BARRETT, and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

No. 76-1138, LEO SHEEP CO.
v.
UNITED STATES OF AMERICA

OPINION ON PETITION FOR REHEARING

The appellees seek a rehearing of the case and ask that such rehearing be en banc. As grounds therefor the appellees urge the following: (1) This Court in its opinion assumed substantive facts outside the record; (2) this Court decided the case on an issue which was not presented to or decided by the trial court, i.e., whether Congress intended to and, by implication, did reserve an easement in the 1862 Union Pacific Railroad grant act; (3) the issue of congressional intent in the 1862 Union Pacific Railroad grant act is an issue of fact which should first be determined by the trial court, after both sides are given the opportunity to present evidentiary matter; and (4) this Court erred in its legal conclusion that there was an implied reservation in the 1862 Union Pacific Railroad grant act. We deem none of these matters to warrant a rehearing, and accordingly the petition for rehearing is denied. We shall briefly discuss each of the matters thus urged.

I.

Counsel takes umbrage at the reference in our opinion to Elk Mountain Safari, Inc. and its operations starting in 1965 and asserts that there is no reference to such in the stipulation of facts presented to the trial court. Such is true, though the information concerning Elk Mountain Safari, Inc. is obviously a part of the overall record now before us. Be that as it may, our opinion does not turn on the operations of Elk Mountain Safari, Inc. So, whether the background information concerning Elk Mountain Safari, Inc. was technically before the trial court is really of little moment. The real and only issue resolved by our opinion concerns congressional intent in 1862, not what Elk Mountain Safari, Inc. did in 1965. A factual statement in an appellate court's opinion which finds no support in the record is not grounds for a rehearing where the statement is in no way related to the basis of the decision. United States v. Gorham, 536 F.2d 410 (D.C. Cir. 1976).

II.

In our opinion we stated that the Government's primary position both in this Court as well as in the trial court has been that in the 1862 congressional grant to the Union Pacific Railroad there was an implied reservation of an easement. That statement is not entirely correct. It is true that in this Court the Government did primarily rely on the theory of an implied reservation in the 1862 grant to the Union Pacific Railroad. We stand corrected, and concede that in the trial court the Government did not rely on such a theory. On the contrary it was the appellees who themselves injected the matter into the case, and sought from the trial court a ruling that there was *no* implied reservation in the 1862 congressional grant.

In its pretrial memorandum the appellees framed one of the issues to be resolved as follows:

> 2. Whether United States was authorized to, and did in fact, reserve rights of way across Union Pacific lands for general public access to alternate public domain sections.

The stipulation of facts was couched in more general terms and listed as the first "legal issue" to be decided whether there was an "implied easement across fee lands for reasonable access to public recreation areas." In its proposed findings and conclusions the appellees stated that one issue to be resolved as a "matter of law" was "[w]hether the United States reserved easements on behalf of the public in the patents to the fee lands issued to plaintiffs' predecessors pursuant to the Union Pacific Railroad Grant Act of 1862."

The trial court thereafter made the following conclusion of law:

> 6. Accordingly, this Court concludes that the United States has not reserved or received by grant, expressly or by implication, and does not now have, any right, by easement or otherwise, in the lands of plaintiffs for access to the east bank of Seminoe Reservoir, or for construction of

public roads across the lands of plaintiffs for access to said reservoir and lands, and absent condemnation proceedings and payment of just compensation is without authority to construct such road.

Based on the foregoing, and particularly, of course, based on the conclusions of the trial court itself, we conclude that the question of whether there was an implied reservation was in the case at the trial court level. We will concede that the theory advanced by the Government was not presented to the trial court.* Ordinarily a party may not lose in the trial court on one theory, and later win on appeal under another theory. But the rule is not inflexible and there are exceptions. Schenfield v. Norton Co., 391 F.2d 420 (10th Cir. 1968). We are of the view that the instant case comes within the exception to the general rule, and that the question of congressional intendment in 1862 is a theory that can be raised on appeal, though it was not specifically raised in the trial court.

It is of more than passing interest to note that the appellees in their written brief filed with this court addressed the question of whether there was an express or implied reservation in the Union Pacific Railroad grant act of 1862 on its merits, and the suggestion that the matter should not have been considered by this Court because it was never before the trial court is first advanced in appellees' petition for rehearing.

III.

Appellees assert that the matter of an implied reservation in the congressional grant of 1862 is a question of fact, and that the matter should be remanded to the trial court to conduct an evidentiary hearing thereon and then make its own conclusion, subject to appellate review. In appellees' pretrial memorandum, the stipulation, appellees' proposed findings and conclusions, and the trial court's own conclu-

*Perhaps the shift in legal theory between the trial court and this Court stems from the fact that apparently the Government had different counsel here than in the trial court.

sions, it would appear that all concerned were of the view that the issue of implied reservation posed an issue of law. And that is our view too.

Again it is of interest to note that the suggestion that this case should be remanded for an evidentiary hearing on congressional intent was not made until the petition for rehearing was filed. In its brief appellees made no such suggestion. Apparently they were perfectly welcome to submit the matter to this Court as involving a question of law. Only when they suffered an adverse ruling did the appellees suddenly claim that this was an issue of fact that required an evidentiary hearing.

IV.

The real issue in the petition for rehearing is whether this Court is correct in its conclusion as to congressional intent in the 1862 Union Pacific Railroad grant act. We agree that this is a difficult problem and not one which is free from all doubt. However, in this connection, the petition for rehearing is simply a reargument of the matter. In spite of appellees' dire predictions concerning the consequences of our opinion, should it be allowed to stand, we remain convinced that ours is the proper disposition of the matter. To hold to the contrary would in our view ignore the teaching of Camfield v. United States, 167 U.S. 518 (1896) and Buford v. Houtz, 133 U.S. 320 (1890) and would be at odds with Mackay v. Uinta Development Co., 219 F. 116 (8th Cir. 1914).

Petition for rehearing is denied.

APPENDIX C

I. Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492:

* * *

Sec. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Sec. 4. *And be it further enacted,* That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of

said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: *Provided, however,* That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

II. Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358:

* * *

Sec. 4. *And be it further enacted,* That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturalist, to be ascertained under such rules as have been or may be established by the commissioner of the general

land-office, in conformity with the provisions of the preëmption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturalist, and such quantity for each settler who claims as a miner, as the said commissioner may establish by general regulation: *Provided, also*, That the phrase "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "an act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land-office.

III. Unlawful Inclosures of Public Lands Act of 1885, 43 U.S.C. §§ 1061-66:

§ 1061.

All inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United

States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and prohibited. Feb. 25, 1885, c. 149, § 1, 23 Stat. 321.

§ 1062.

It shall be the duty of the United States attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also conferred on any United States district court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this chapter; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court. Feb. 25, 1885, c. 149, § 2, 23 Stat. 321; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 1, 62 Stat. 909.

§1063.

No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided,* This section shall not be held to affect the right or title of persons, who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith. Feb. 25, 1885, c. 149, § 3, 23 Stat. 322.

§1064.

Any person violating any of the provisions of this chapter, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding $1,000, or be imprisoned not exceeding one year, or both, for each offense. Feb. 25, 1885, c. 149, § 4, 23 Stat. 322; Mar. 10, 1908, c. 75, 35 Stat. 40.

§ 1065.

The President is authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of the public lands mentioned in this chapter, and to employ civil or military force as may be necessary for that purpose. Feb. 25, 1885, c. 149, § 5, 23 Stat. 322.

§ 1066.

Where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this chapter without authority from the Secretary of the Interior. Feb. 25, 1885, c. 149, § 6, 23 Stat. 322.